No. 80-485
IN THE

Supreme Court of the United States

October Term, 1980

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

vs.

JONG HA WANG and KYUNG HWAN WANG,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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RESPONDENTS' BRIEF IN OPPOSITION.

The Respondents Jong Ha Wang and Kyung Hwan Wang, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 622 F.2d 1341.

Question Presented.

Whether the unsubstantiated argument that the administrative burden of the Immigration Service will be increased justifies a review of the evidentiary finding of the Court of Appeals?

Reasons Why the Petition for Writ of Certiorari Should Be Denied.

1. Administrative inconvenience has consistently been rejected by this Court as a reason for denying Fifth Amendment procedural due process to persons.

a) In *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed. 2d 270 (1977) and *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed. 2d 218 (1964), this Court held that the denial of certain procedural rights could only be justified "by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived", citing *Kennedy v. Mendoza-Martinez*, 218 F. Supp. 302, 320.

Contrary to the assertions by the government, the holding of the Court of Appeals does not require a hearing or otherwise increase the burden of the Immigration and Naturalization Service (hereinafter referred to as "INS").

The language of the Court of Appeals clearly requires a hearing only where a *prima facie* case has been established on the affidavits submitted by a moving party. The determination whether a *prima facie* showing of extreme hardship has been made ". . . is not bound by hard and fast rules; each case must be decided on its own facts". *Wang v. INS*, 622 F.2d 1341, 1347 (9th Cir. 1980) citing *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979).

Review by the Court of Appeals is limited solely to the question of whether the INS has abused its discretion. If the Board of Immigration Appeals (the "Board") or the immigration judge determines that a *prima facie* case has not been established and denies the alien's motion to reopen deportation proceedings, the Court of Appeals decision requires only that the INS articulate the reasons why the discretion authorized by statute was not favorably exercised.

Thus, the opinion below in this case will do nothing to promote additional filings of applications or increase the administrative burden. It will only reinforce the discretionary authority vested in the INS pursuant to statute and now require the INS to specify the reasons for the denial of such motions. The holding will also require the Board to avoid drawing fine lines of distinction and will prevent inconsistent holdings. See *Wang, supra* at page 1347.

b) Also contrary to the government's assertions, the *Wang* decision does not open another avenue of delay for aliens in requiring the INS to hold hearings in all applications for suspension of deportation. The standard for granting hearings on motions to reopen will be the establishment by the moving party of a *prima facie* case based upon nonconclusionary affidavits setting forth facts which were not available to the alien at the prior deportation hearing and which, if true, would establish a likelihood of eligibility for the relief sought. The spectre raised by the government argument that every deportable alien will rush to submit an application for suspension of deportation and then, without more, be entitled to a hearing is neither true nor is required by statute or the INS operating instructions. The concern that the administrative burden will be increased by the Court of Appeals decision is speculative and conjectural. Petitioner presents no competent evidence for which this Court must take judicial notice. Moreover, no source for any of the statistics cited in the petition are mentioned by the government, most likely because the number of applications submitted under 8 U.S.C. §1254 is inconsequential in relation to the total number of applications submitted annually to the INS for the entire spectrum of benefits available, and, is furthermore inconsequential in relation to the 600,000 people who immigrate to the United States annually.

In *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed. 2d 270 (1977) which involved the availability of social security benefits to members of both sexes, this Court held that the denial of procedural rights in the administration of the social security laws could only be justified in exceptional situations where the public necessity far outweighed the right of which the individual was being deprived. Denying the simple right of a hearing to a person who has established a *prima facie* case for that hearing cannot, it is submitted, be justified by administrative convenience to the INS.

If the INS is dissatisfied with the procedures and benefits available and created by 8 U.S.C. §1254 an amendment can be sought from Congress. However, since the Congressional amendments to 8 U.S.C. §1254 in 1975 changed the language from "exceptional and extremely unusual hardship" to the present standard of "extreme hardship", it has been generally accepted that Congress intended at that time to reduce the burden of proof and degree of hardship required to qualify for the benefits of suspension of deportation.

It Is Both Uneconomical and Duplicative of This Court to Review the Evidentiary Conclusion of the Court of Appeals That a Prima Facie Case of Extreme Hardship Has Been Established.

The Court of Appeals has merely expressed an opinion that the INS, in enforcing its statutory discretion, should articulate reasons in arriving at its decision to deny motions to reopen seeking the benefits of 8 U.S.C. §1254.

Even the dissenting opinion filed by Justice Sneed recognized the confusion generated by the summary denial of motions by the Board of Immigration Appeals:

> "The difficulty with this case is that it is not clear why the BIA [Board of Immigration Appeals] refused to reopen the deportation proceedings. After summarizing

> the facts set forth in the Wangs' motion the BIA concluded that a *prima facie* showing of extreme hardship was not made. Neither what was lacking nor the precise nature of a *prima facie* case was set forth. Moreover, neither the statute nor the regulations mentioned the *prima facie* concept. Perhaps the concept is used by the BIA to mean that even accepting that the movant's facts is [sic] true, extreme hardship has not been shown. Equally plausible, however, is the possibility that there is sufficient doubt about the movant's facts on the part of the BIA to preclude the existence of the *prima facie* case. Or perhaps both of these possible meanings are mingled with a result that the BIA means when it denies the existence of a *prima facie* case that it doubts whether certain facts exist and even if they do, a showing of extreme hardship would not be made out." *Wang, supra* at page 1350.

The issues raised by the Petition simply do not rise to constitutional dimensions justifying the intervention of this Court. The operating instructions of the INS do not state the minimal amount of evidence which an applicant must produce in order to have a motion to reopen granted. When the motion to reopen was originally filed hereinbelow, the Court of Appeals had before it the copious certified record. Having reviewed the extensive documentation, it concluded that Respondents had made a *prima facie* case in accordance with established precedents. For this Court now to review the same certified record and to substitute its fact-finding decisions for the decision of the Court of Appeals is duplicative and an uneconomical use of this Court's precious time. If the parties in this matter were reversed, recent denials of petitions for writ of certiorari seeking benefits under §1254(a)(1) indicate that this Petition would and should be summarily dismissed.

Conclusion.

Because the government cites no statistics for its fears that the Immigration Service will be inundated by similar applications, because administrative inconvenience to the Immigration Service is not a basis for depriving a right to any person, and because the Court of Appeals has determined that the Respondents have satisfied the burden of proof necessary to establish a *prima facie* case, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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